

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 21, 1996

TO: Michael Dunn, Regional Director, Region 16

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Concept Controls/Volt Services, Case 16-CA-1804

524-5012-4000, 524-5012-6500, 8524-8307-8087

This case was submitted for advice on whether Employer Volt's refusal to refer a paid union organizer was privileged because the organizer presented a conflict of interest to Volt's business which is the providing of employment referrals.

Peters is a licensed journeyman electrician who also is a paid organizer for the Union. On April 25, 1996, Peters visited the Volt office in response to its newspaper advertisement for journeymen electricians. In his application, Peters noted his current organizer position with the Union.

During the interview, Volt asked whether Peters would leave his current employment and Peters explained that his position allowed him to work for any company he chose for the purpose of providing Union representation. When Volt asked for further explanation, Peters stated that there were a number of local electrical contractors whose employees were represented by the Union, and that the Union was a pool of manpower who made referrals to those employers upon request. Volt asked Peters whether, if it referred Peters to the Volt customer, would Peters work to recruit that customer's employees for the Union. Peters replied that he would do organizing but on nonwork time. When Volt asked Peters if Volt's customer could just call the Union directly for electricians, Peters replied that the Union would be happy to work with Volt's customer. Volt offered to call Peters back after conferring with the Volt customer, Concept Controls.

Later that afternoon, Peters called Volt who initially stated that it was not going to fill the advertised position. Volt then responded that it would fill the position, but that it could not refer Peters because he was a Union organizer and presented a conflict of interest to Volt. Volt denied the above assertions by Peters and instead asserted that it told Peters that it could not hire him because Volt had not yet checked out his former employment.

The following day, Peters sent another journeyman electrician, Lincoln, to apply for the advertised position with Volt. In his application, Lincoln made no reference to his Union affiliation. During the interview, Volt stated that its customer did not want anyone affiliated with the Union; that the day before a Union member had applied for employment; but that Volt's customer declined the referral of that applicant because the customer did not want anyone attempting to organize or recruit its employees. Volt eventually referred Lincoln to its customer Concept Controls, but Lincoln declined the referral.

Concept Controls denies that it told Volt not to refer Peters because Concept didn't want its employees organized. Concept instead asserts that Volt stated that it had decided not to refer Peters because his Union organizer status presented Volt with a conflict of interest. ⁽¹⁾ The Region credits Concept's statement and will dismiss the allegation against Concept because Volt did not refer Peters to Concept who did not discriminatorily refuse to hire him.

Volt asserts a contrary basis for not referring Peters to Concept. Volt asserts that its review of Peter's application form after the interview revealed that Peters had failed to authorize Volt to contact Peter's present employer. Volt called Peters and asked him to return to Volt's offices to complete that portion of the application form. ⁽²⁾ Around that same time, Volt referred Lincoln and another applicant to Concept. Volt asserts that Concept inquired whether Lincoln worked for the Union. Volt further asserts that it responded that Lincoln did not work for the Union, but that Volt would have referred him in any event because Volt's policy prohibits discrimination for union activity. Finally, Volt asserts that when Peters did return and complete his application

form the following day, Volt determined that he was eligible for hire.⁽³⁾ However, Volt asserts that at that point in time, Concept was not requesting any further referrals.

We conclude, in agreement with the Region, that Volt discriminatorily refused to hire and refer Peters because of his Union organizer status.

We would first argue that the evidence supports an allegation that Volt discriminatorily refused to refer Peters because of his Union organizer status, and that Volt's asserted reason for not referring Peters was pretextual. Volt asserts that by the time Peters authorized verification of his employment, i.e., returned and checked a box on the application form, Concept had already ceased requesting referrals. We conclude that this assertion is clearly pretextual for several reasons.

First, Volt made statements to both Peters and Concept clearly indicating that Volt did not want to refer Peters because of his Union organizer status.⁽⁴⁾ Second, Volt's insistence that Peters personally appear to check a box on his application form demonstrates that Volt was delaying Peters with a procedural roadblock until Volt could make other referrals. Finally, Volt's asserted need for authorization to verify Peters' employment is belied by the fact that Volt never called the Union for such verification. We therefore would first argue that Volt's asserted basis for not referring Peters was pretextual, and that Volt discriminatorily refused to refer Peters because of his Union organizer status.

Second, even assuming arguendo that Volt could credibly assert Peters' Union organizer status as a basis for not referring him, we agree that Peters' alleged conflict of interest did not present Volt with sufficient business justification to refuse to refer him. We note that Volt admits in its position statement that Volt "rarely" is called upon to make referrals for journeyman electricians. Moreover, any impact upon Volt's business by Peters' organizing activities would be remote and speculative, because it requires a lengthy chain of events including a successful organizing campaign by Peters; the recognition of the Union; and the signing of a collective-bargaining agreement with an exclusive hiring hall. In our view, such a speculative outcome is wholly insufficient justification, particularly given the fact that electrician referrals is an extremely small amount of Volt's business.⁽⁵⁾

In sum, the Region should issue complaint absent settlement alleging that Volt discriminatorily refused to refer Peters because of his Union organizer status.

B.J.K.

¹ According to Concept, Volt stated that both the Union and Volt were in the same business of providing labor, and that Volt didn't want to refer someone who would steal Volt's customer.

² Completion of the form simply involved checking a box which Peters over the telephone asked Volt to do for him. Volt declined and required Peters to come back down to its offices and check the box personally.

³ However, Peters' supervisor at the Union hiring hall asserts that Volt never contacted the Union to verify Peters' employment.

⁴ In this regard, we note that the Region credited Concept and Peters and discredited Volt in its contrary assertion. We also note that Volt made contrary statements to the second Union applicant Lincoln.

⁵ Contrast *Aclang, Inc.*, 193 NLRB 86 (1971) where the employer had been awarded a government contract over the competing contract bid of another employer in the identical business. The employer refused to hire three individuals closely associated with the competing bidder, viz., the secretary-treasurer, the wife of the president and the wife of the vice president. The General Counsel alleged a discriminatory refusal to hire these individuals because of their union activity. The ALJ, adopted by the Board, found no violation and no pretext: "...certainly it is understandable that the Respondent would not employ viable and active competitors." *Id.* at 91. In sharp contrast to the circumstances in *Aclang*, Peters' organizing activities in the instant case did not amount to "viable and active" competition to Volt's business.